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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 29554

In the Matter of

Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	))))	WT Docket No. 96-162

COMMENTS OF BELL ATLANTIC CORPORATION AND NYNEX CORPORATION

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Bell Atlantic Corporation and NYNEX Corporation hereby submit their comments on the Commission's Notice of Proposed Rulemaking in this proceeding.[1]

I. SUMMARY: THE COMMISSION SHOULD CHANGE ITS APPROACH TO LEC-CMRS SAFEGUARDS.

The Telecommunications Act of 1996 radically changed the paradigm for regulating the telecommunications industry in order to reflect, and direct, the dramatic changes occurring in the industry itself. The Commission has recognized that the Act "fundamentally changes telecommunications regulation," and replaces the old regulation-heavy approach with "precisely the opposite approach."[2] Rather

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[1]Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, WT Docket No. 96-162, FCC 96-319, released August 13, 1996.

[2]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 released August 8, 1996 ("Interconnection Order"), at ¶ 1.

than adjust old rules from the top down, it must break the mold, redefine the fundamental principles that should guide regulation, and build up from them.

The last paragraph of the Notice is true to that vision. It correctly identifies the developments and principles which should determine how the Commission regulates LEC provision of CMRS. Paragraph 127 notes the "dynamic changes" in the telecommunications industry and the new "legislative mandate to open markets." It rightly states the key regulatory principles as controlling the exercise of market power by "the least intrusive means" and "establishing regulatory symmetry" for CMRS. The rest of the Notice, however, does not fulfill the vision of paragraph 127, or the mandate of Congress, because it takes an incremental approach that merely considers how to adjust existing rules.

The Commission should implement "the more flexible competitive paradigm established by the 1996 Act" (Notice at ¶ 3) by creating a new paradigm for LEC-CMRS regulation. It must first clear the deck of the current rules, start with the principles in ¶ 127, and then intervene into the CMRS market only as necessary to achieve those principles. This means that Section 22.903, a vestige of history, must be relegated to history. It also means that the BOCs should be subject only to those transitional safeguards that are clearly needed to ensure that CMRS competition can continue to develop.

The Commission should rethink its approach to LEC-CMRS regulation. The comments below suggest a different approach, one that follows a new path toward fulfilling Congress' mandate and achieving the goals of this proceeding.

1. Define the Governing Principles. These comments begin where the Notice ends -- with the principles of least intrusive and symmetrical regulation. Rules cannot be considered in a vacuum; they can be justified only if they meet the principles and legal standards that Congress and the Commission have said will govern the provision of CMRS.

2. Repeal Section 22.903 Immediately. The principle of "symmetry" does not permit a rule that applies only to BOCs but not other LECs, and to cellular service but not other CMRS. The principle of "least intrusive means" does not permit structural requirements which go beyond safeguards that the Commission has found to be sufficient to regulate carriers with market power. Section 22.903 cannot pass muster under these standards, nor can it be found lawful under the Sixth Circuit's ruling and the 1996 Act. The Notice's "Option 1," which would preserve structural separation for a time, cannot be adopted. The Commission should follow "Option 2," and immediately terminate Section 22.903.

3. If New Regulation is Found to be Necessary, Limit it to Separate Affiliate and Existing Competitive Safeguards. The Notice proposes to adopt requirements based on the plan the Commission approved for the provision of PCS by Pacific Bell. That plan provides for Pac Bell to offer PCS through a separate affiliate, and to demonstrate how it will comply with cost accounting and other existing safeguards. The record at this point does not justify a separate affiliate requirement. If, based on new specific evidence, the Commission finds that this

requirement is necessary, it would be an appropriate interim rule during the transition to greater competition. The other proposed "compliance plan" requirements serve no purpose which is not achieved by a separate affiliate rule, existing accounting rules and other Commission actions, and should not be adopted.

4. Apply Any Safeguards to In-Region LEC-Owned CMRS Systems for a Transitional Period. Principles of regulatory symmetry require that any safeguards be imposed on all Tier 1 incumbent LECs, not just the BOCs, and that they govern the operation of all broadband CMRS systems, not just cellular. In addition, the rules should apply only to LEC-owned CMRS systems in markets that overlap the LEC's landline telephone service area. As the Commission notes, there would be no rationale for applying safeguards to out-of-region CMRS. Given that the rules are being considered only to address the transition to effective competition, the safeguards should automatically sunset once the "competitive checklist" in the 1996 Act is met, or in three years, whichever is earlier.

5. Decline to Regulate Joint Marketing and Sale of CMRS. There is no "demonstrated need" (Notice at ¶ 11) for additional rules governing the manner in which LECs and CMRS providers jointly promote and sell services to customers. Nor is there any need to regulate how a LEC itself markets and sells CMRS beyond the cost allocation rules that already apply to a LEC's businesses.

Congress has declared in Section 601(d) of the 1996 Act that joint marketing is freely permitted. That provision needs no elaboration.

II. CMRS-LEC SAFEGUARDS MUST BE CLEARLY NECESSARY AND MUST BE SYMMETRICAL.

The Commission should start where the Notice ended -- with recognition of the legal principles and standards that must govern any rule it adopts. Rules for provision of mobile services cannot be issued based on unsupported speculation, but must be rooted in findings that they meet two legal standards. If they do not, such rules would be unlawful under the tenets of administrative law that govern this Commission.

A. Rules Must Be The Least Intrusive Needed To Prevent Identifiable Harms.

The first standard, as the Notice stated (¶ 127), is that any rules must be "the least intrusive means" necessary to prevent market abuses. This standard is based on two separate amendments to the Communications Act. In the Omnibus Budget Reconciliation Act of 1993,[3] Congress found that regulation can distort and actually impair competition, and thus mandated that any regulation of the CMRS industry must be clearly warranted. In the 1996 Telecommunications Act, Congress broadened that principle to all telecommunications services, enacting a "pro-competitive, deregulatory national policy framework" in which regulatory

[3]Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

restraints are to be removed except where specifically justified.[4] The Commission must therefore not only find that a rule is clearly needed to prevent an identifiable harm, but also that it is the least restrictive means of doing so.

"Least restrictive means" encompasses both the scope of the rule and its duration. Telecommunications markets are rapidly changing, and both the CMRS and landline industries are witnessing steadily increasing competition. Congress has recognized that rules have an unfortunate habit of outlasting the conditions they were meant to address, and required that key provisions of the 1996 Act must "sunset" after a certain time. Because the rules under consideration are transitional, the Commission must determine for how long they should remain in place.

The Commission has recognized that its regulation of CMRS must be narrowly defined in both scope and duration, and must respond to a compelling need for intervention into the market. For example, in invalidating the efforts of eight states to continue regulation of cellular service, the Commission declared that in the 1993 Act, "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need."[5] And, in recently adopting a requirement that broadband CMRS providers offer unrestricted resale,

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[4]S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) at 1.

[5]Report and Order, In Re Petition of the Connecticut DPUC, 10 FCC Rcd 7025 at 7031 (1995) (emphasis added).

the Commission identified the specific problem, wrote the rule narrowly to address that problem, and imposed it for only a temporary period:

> [T]he resale rule, like all regulation, necessarily implicates costs, including administrative cost, which should not be imposed unless clearly warranted. We therefore conclude that our resale rules should be narrowly tailored to apply only to those services where, due to competitive conditions, its application will confer important benefits, and only for so long as competitive conditions continue to render application of the resale rule necessary.[6]

B. Rules Must Consistently Treat Similar Providers and Services.

The Notice also correctly acknowledges (¶ 127) that any rules must promote the goal of "establishing regulatory symmetry." This again is not only Commission policy; it is the law. Congress' second cardinal objective in the 1993 amendments was that, "consistent with the public interest, similar services are accorded similar regulatory treatment."[7] It found that disparate regulation impairs competition and disserves consumers, and thus established the principle that rules must evenly treat competing CMRS providers. Again in the 1996 Act, Congress removed the distinct regulatory structures that had grown up around different types of providers and substituted it with provisions that are intended to regulate carriers offering similar services consistently. If the Commission decides to adopt

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[6]First Report and Order, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶ 14. ("CMRS Resale Order")

[7]H.Conf. Rep. 103-213, 103rd Cong., 1st Sess. 493 (1993).

asymmetrical rules, it bears the burden of justifying precisely why disparate regulation is justified.

III. THE COMMISSION MUST REPEAL SECTION 22.903 NOW, NOT LATER.

The separate affiliate and competitive safeguards discussed in Section IV of these comments address all of the concerns of the Notice. If found to be necessary to discourage and detect any anticompetitive conduct by LECs, they will enable the Commission and LEC competitors to achieve those goals. The Commission should go no further by maintaining Section 22.903, the rule requiring BOCs to offer cellular service only through a "structurally separate" subsidiary. It is an anachronism, cannot be justified under the standards of regulatory parity and least-intrusive regulation, and is inconsistent with the 1996 Act.

The Notice offers two options for dealing with Section 22.903. Option 1 would keep the rule in modified form for some period of time. Option 2 would repeal the rule immediately. There can be no serious debate that Option 2 is the only lawful and rational course. To discharge Congress' mandate, the Commission should clear the slate of this outmoded and unlawful rule, and consider instead new industry-wide rules tailored to meet the specific competitive problems that the Commission finds require its intervention.

A. The Commission Has Abandoned the Premise for the Rule.

Section 22.903 is a relic of history that cannot lawfully be preserved because the premise underlying it was long ago abandoned. The rule was adopted in 1981, at a time when the Commission believed that "structural separation" was the correct premise for regulating AT&T.[8] It was applied to the BOCs in late 1983. Less than three years later, however, the Commission discarded structural separation in the landline context because it was found to impose unjustified burdens on the BOCs and was, if anything, harmful to competition.[9] For ten years, the Commission has persistently advocated "nonstructural safeguards" for regulating the BOCs. Section 22.903 is an orphan, a product of the agency's 1970s approach to regulation that (except for cellular) was long ago abandoned. Where, as here, an agency's own actions have undermined the legitimacy of a rule, and the premises on which it was based, the rule cannot be maintained.[10]

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[8]There is no small irony in the fact that the BOCs remain restricted by a rule originally aimed at AT&T, while AT&T, the largest cellular and interexchange carrier, is not constrained by any comparable regulation. Disparate regulation of BOC cellular properties becomes more out of touch with marketplace realities with each passing day. For example, yesterday AT&T rolled out digital cellular service to 40 cities with a footprint of 70 million POPs, which "gives it short-term advantage over existing cellular operators." "AT&T Launches Nationwide PCS-Type Service, Seeking Advantage," Communications Daily, October 3, 1996, at 1.

[9]Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), 104 FCC 2d 958 (1986) (subsequent history omitted).

[10]See Meredith Corp. v. FCC, 809 F.2d 863, 873 (D.C. Cir. 1987) (the ordinary presumption that a rule remains valid does not apply where "the Commission itself has already largely undermined the legitimacy of its own rule"); Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (once the original basis for a rule no longer exists, it cannot continue without a fresh justification that it is needed.)

B. Section 22.903 Is Asymmetrical, Excessive Regulation.

The Sixth Circuit held that on the record before it, Section 22.903 was not justified under the principle of symmetry.[11] As the court noted, the rule restricts only seven incumbent LECs, rather than all incumbent LECs, and it regulates only cellular services, even though many other services have been found to be competitive with cellular. The Notice understandably provides no reason for a BOC-specific, cellular-specific rule, because if the market problems the Notice identifies exist, they are confined neither to the BOCs, nor to the provision of cellular services.[12] The Sixth Circuit's decision compels repeal of Section 22.903.

Nor can Section 22.903 be squared with the principle of regulating only to the extent necessary to address an identified problem. The rule reflects now-discarded theories about the appropriate approach to curbing market power, and contains obligations that cannot be justified in a mature cellular industry. If the Commission finds rules are needed, affiliate and competitive safeguards to govern transactions between incumbent LECs and their CMRS affiliates would meet that need, and Section 22.903 would serve no additional purpose. The Notice does not identify any market imperfections that would not be addressed by those

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[11]Cincinnati Bell Telephone v. FCC, 69 F.3d 752 (6th Cir. 1995).

[12]The Notice acknowledges the lack of symmetry in Section 22.903, but expresses concern about imposing the rule on LECs which have previously not been subject to it. That concern would be mooted by repeal of Section 22.903.

safeguards, but would be addressed by structural separation. The existing rule cannot meet the "least intrusive means" standard.

C. Structural Separation for CMRS Violates the 1996 Act.

In any event, preserving Section 22.903 would violate the 1996 Act. The Notice incorrectly asserts that the Commission has the authority to maintain structural separation for the provision of cellular service. To the contrary, the Act does not grant it that authority.

Congress drew a fundamental distinction between the provision of interLATA telecommunications, manufacturing and certain information services on the one hand, and "incidental interLATA" services (including CMRS) on the other. The first group of services may be provided only through a structurally separate affiliate. Section 272(a). That affiliate must have separate books of account, separate officers, directors and employees, and meet other obligations that are comparable to the obligations currently imposed on BOC cellular affiliates. Section 272(b).

In contrast, BOCs may offer CMRS and other incidental interLATA services without employing this structurally separate entity. Section 272(a)(2)(B)(i). Had Congress wanted CMRS to be provided in the same manner as the BOCs must provide non-incidental interLATA service, it would not have carved CMRS out of the structural separation provisions.

The Notice repeatedly cites Section 272(f)(3) as authority for retaining Section 22.903. It paints this provision as an unbridled "savings" clause which permits the Commission free rein to impose whatever safeguards it deems to be in the public interest. The Notice misreads Section 272(f)(3). That section is part of Section 272(f), which is the "sunset" provision for addressing BOC provision of interLATA, manufacturing and information services -- but not CMRS and other incidental services. Subsections 272(f)(1) and (f)(2) set deadlines for the restrictions. Subsection (f)(3) then states that "nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity." Subsection (f)(3) merely preserves whatever authority the Commission has been granted to impose safeguards after the expiration of the statutory sunset periods for those services subject to sunset under Section 272(f). CMRS, however, is not subject to Section 272(f) at all, because it need not be provided through a Section 272(b) affiliate.

Without Section 272(f)(3), there is no section in the 1996 Act on which retention of structural separation can be based. To the contrary, Congress' deliberate exemption of CMRS from the separate subsidiary provisions of Section 272 provides clear direction that the Commission cannot subject this service to structural separation. For this reason as well, Section 22.903 must be repealed, and repealed now.

IV. IF THE COMMISSION FINDS THAT NEW REGULATION IS NEEDED, ONLY A SEPARATE AFFILIATE SAFEGUARD SHOULD BE CONSIDERED.

The Notice (at ¶¶ 7, 116) proposes to adopt five "competitive safeguards" for LEC provision of CMRS, based on those which were approved for Pacific Bell's provision of PCS.[13] The record at this point does not demonstrate the requisite compelling need for any of these standards. If, based on specific evidence in the comments, the Commission is able to find that a "separate affiliate" safeguard is necessary as the least intrusive means to protect against demonstrated competitive problems, it would be an appropriate rule while local markets are in transition to effective competition. The proposed mandatory compliance plan, however, cannot be justified. It would achieve nothing that is not already being achieved through existing safeguards and regulations. These additional requirements would violate Congressional and Commission policy against unnecessary regulation.

A. The Current Record Is Insufficient To Justify Safeguards.

At the outset, the Commission must define the precise problems that it seeks to prevent or cure through regulation. While the Notice contains scattered references to what it labels "concerns" of commenters, it does not isolate and

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[13]Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, Pacific Bell, et al. Plan of Nonstructural Safeguards Against Cross-Subsidy and Discrimination GEN Docket No. 90-314, DA 96-256, released February 27, 1996.

define the problem, nor does it establish why competitive forces -- and the sanctions of the antitrust laws -- are inadequate to address them. This is not legally sufficient. The Commission must specifically find, based on the record, that there is a specific set of competitive problems and that the rules it adopts are the least intrusive means of preventing them.

Much of the alleged concerns fall into two areas. First, LECs may use their financial resources, gained from their market power in the landline exchange market, to subsidize CMRS systems. Second, LECs may impair competition to their CMRS systems by favoring their "captive" CMRS system on terms and conditions of interconnection or resale. These concerns are set out in ex parte letters or brief comments, many of which predate the 1996 Act, and have little of substance behind them. Hyperbole and speculation aside, there is no concrete evidence that a LEC has, can or would use landline market power to distort and impair competition in the CMRS market. To the contrary, much in the record to date explains why, under current market conditions and price-cap regulation, attempts to abuse market power would be neither likely nor successful.[14]

The Notice incorrectly appears to presume that the BOCs have the burden to demonstrate why safeguards are too burdensome. This is not the proper legal standard. To the contrary, the Commission must find that the proposed rules are

[14]See, e.g., Notice at ¶¶ 26, 27, 66, 180, and Appendices A and B, and pleadings referenced therein.

in fact necessary. The 1993 and 1996 Acts place the burden of persuasion on those who would impose regulation.

B. If Safeguards Are Needed, A Separate Affiliate Rule Would Meet that Need.

The first safeguard would require LEC provision of facilities-based CMRS through a separate CMRS affiliate.[15] The Notice (at ¶¶ 5, 117-119) states that this rule would, in contrast to the existing cellular "structural separation" rule, not require independent operation and separate officers and personnel. Instead it would be limited to three elements. The CMRS affiliate would (1) maintain separate books of account, (2) not jointly own transmission or switching facilities with the LEC, and (3) obtain LEC "communication services at tariffed rates and conditions."

If the record demonstrates the need for safeguards, this separate affiliate requirement would fully address the Commission's concerns. It would force the LEC to operate the CMRS network through a separate entity, thereby facilitating the efforts of competitors and the Commission to monitor potential "abuses" of the LEC's exchange market power. It will also necessitate a publicly available,

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[15]The Notice's discussion of safeguards addresses the relationship between LECs and entities which hold licenses to operate cellular, PCS or other CMRS networks. In other contexts the Commission has referred to these entities as "facilities-based" providers to distinguish them from resellers of CMRS, and this term will thus be employed here. As discussed in Part VI of these comments, where a LEC does not own the network for providing CMRS but merely resells service, there is no need for imposing any safeguards other than those which the LEC is already subject to under current cost allocation rules.

written interconnection agreement between the LEC and the CMRS affiliate which CMRS competitors could compare with the terms of their own interconnection arrangements.

A separate affiliate safeguard must be limited in scope to the above three provisions. There would be no rational (or legal) basis to impose "structural safeguards" akin to existing Section 22.903. In addition, the Commission should modify the third requirement. As proposed, it does not account for the negotiation of contractual arrangements for services generally or for interconnection in particular. Section 251 of the 1996 Act expressly provides for such contractual agreements. The requirement should state that the affiliate must obtain LEC-provided telecommunication services "pursuant to publicly available tariffs, contracts or other terms and conditions."

C. Additional Accounting, CPNI, Interconnection and Network Disclosure Requirements Are Unnecessary.

The Notice goes beyond the separate affiliate safeguard by proposing that a LEC be required to file a "nonstructural safeguard plan." In that plan the LEC would describe how it intended to comply with Part 32 and 64 accounting rules and with CPNI, interconnection, and network disclosure obligations.

This rule would achieve nothing that is not already required of LECs. It would force the LECs to "describe" (Notice at ¶ 7) obligations that they already must meet. LECs are subject to Commission monitoring to ensure they meet those requirements, and to sanctions for violating them. Ordering LECs to file a

CMRS-specific plan would also impose a paperwork burden on them that cannot be justified under applicable rules and precepts governing reporting obligations.

The Notice (at ¶ 120) proposes to require that LECs comply with Part 32 and Part 64 cost allocation rules in the provision of CMRS. These rules are, however, required today for affiliate transactions of the BOCs, Tier 1 LECs and their affiliates, and these carriers must already submit and update their cost accounting manuals (CAMs). The rules already provide the Commission with ample information for monitoring and detecting the flow of dollars between LECS and CMRS affiliates.[16]

The Notice (at ¶ 121) proposes to require LECs to specify a program for protection and dissemination of CPNI. This provision is unnecessary. While it is drawn from the Pac Bell plan, that plan did not reflect Section 222 of the 1996 Act, which completely revamps the regulatory approach to customer proprietary information. The Pac Bell plan also predated the Commission's pending proceeding to adopt industry-wide rules to implement Section 222.[17] There is accordingly no need for the Commission to consider specific CPNI rules here, nor

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[16]In addition, the Commission has begun a separate proceeding to consider revisions to its accounting and cost allocations rules. Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-150, FCC 96-309, released July 18, 1996. There is no need for the Commission to take up accounting safeguards in the instant proceeding as well.

[17]Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221, released May 17, 1996.

to require carriers to describe their process for meeting those obligations. The Commission will adopt whatever rules to govern use and disclosure of CPNI for all carriers it finds are warranted, and carriers who breach their CPNI obligations will be subject to enforcement actions and other sanctions. Separate safeguards here would be duplicative and thus unnecessary.

The Notice (at ¶¶ 122-24) also would require LECs to include in their plan a description of how they would comply with interconnection and network disclosure obligations. The Notice acknowledges that these requirements may be rendered unnecessary by the Commission's rules implementing Section 251. This is correct. The seventy pages of new rules,[18] which govern in detail the manner in which LECs must interconnect, provide ample safeguards to detect and address potential anticompetitive conduct. There is no reason for requiring LECs to file plans stating that they will comply with these rules -- they already must do so.

V. ANY SAFEGUARDS SHOULD APPLY TO INCUMBENT LEC PROVISION OF BROADBAND CMRS IN-REGION, FOR A TRANSITIONAL PERIOD.

The Notice asks questions as to the scope and duration of the proposed safeguards. Application of the two standards of "least restrictive means" and "symmetry" leads to the following answers.

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[18]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order and Second Report and Order, CC Docket No. 96-98, FCC 96-325 and 96-333, released August 8, 1996.

A. The Safeguards Should Apply to All Broadband CMRS.

The Notice (¶ 126) proposes that the safeguards should govern all CMRS services. While the safeguards should apply to cellular, broadband PCS and wide-area SMR, they should not apply to other commercial mobile services.

The 1993 amendments to Section 332 of the Act direct that similar commercial mobile services be regulated consistently. In addition, in its proceeding to implement Section 332, the Commission concluded that "our policy goals and our understanding of the dynamic nature of the marketplace lead us to the conclusion that all commercial mobile radio services compete with one another, or have the potential to compete with one another," and held that all provision of CMRS should generally be regulated under consistent rules.[19] In several recent orders, the Commission has refined its analysis by distinguishing between cellular, broadband PCS and wide-area SMR providers on the one hand, and narrowband mobile services on the other.[20] It has found that narrowband services do not yet compete substantially with broadband services, are less likely to compete in the local exchange market, and are characterized by more vigorous competition among narrowband providers.

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[19]Third Report and Order, Implementation of Section 332 and 3(n) of the Communications Act, 9 FCC Rcd 7988, 8010-8032 (1994).

[20]Telephone Number Portability, First Report and Order, CC Docket No. 95-116, FCC 96-286, released July 2, 1996, at ¶156; Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶21.

The Commission's prior actions require that safeguards should apply to the provision of broadband PCS and wide-area SMR. The need for safeguards is based not on the level of competition within discrete mobile services, but on the concern that LECs will leverage market power into CMRS. To the extent the concern is valid, it is no less valid when the LEC competes for PCS or paging customers than when it competes for cellular customers. In either case, the safeguards are aimed at preventing distortion of CMRS competition. Given that, as the Commission has found, PCS and wide-area SMR carriers are directly challenging cellular providers for both existing and new customers,[21] any rules that apply to cellular should also apply to PCS and wide-area SMR. Given the differences in competitive position and services offered by narrowband services, however, there is no need to extend safeguards to LEC-owned narrowband CMRS businesses.

B. The Safeguards Should Apply To All Incumbent LECs.

The principle of parity mandates that any safeguards that are adopted must apply to all incumbent LECs, not just BOCs, which own CMRS networks. Prior to 1996, the MFJ subjected BOCs to numerous restraints in their provision of CMRS which did not apply to other LECs, even to comparably large LECs such as GTE. The 1996 Act corrects that disparity because it terminates the MFJ and allows the BOCs to provide CMRS on the same terms as other LECs can. While Congress imposed special restrictions governing BOC provision of landline interLATA,

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[21] CMRS Resale Order, supra n. 6, at ¶18.

manufacturing and information services, those restrictions do not apply to CMRS. See Sections 272-275. Other CMRS-specific provisions, such as Section 705's treatment of access to interexchange carriers, do not distinguish between BOC-owned CMRS providers and other CMRS carriers. The Commission's regulation of CMRS must follow Congress' instruction.

Imposing greater restrictions on the BOCs would be illogical and anachronistic as well as contrary to the 1996 Act. If there is a risk that a BOC may improperly cross-subsidize CMRS operations, or discriminate against its affiliate's competitor, so too is that risk present when other incumbent LECs provide CMRS. The 1996 Act subjects incumbent LECs to special regulation because of their dominant market position. See, e.g., Section 251(c). That regulation is not limited by the Act to the BOCs.

The Notice (at ¶ 115) asks whether symmetrical regulation should be limited to Tier 1 incumbent LECs or applied to all LECs. Congress did not automatically exempt smaller LECs from the new statutory requirements. It did, however, permit "rural" and other small carriers to demonstrate that compliance should not be required. Section 251(f). The proposed safeguards would involve compliance with Part 32 and Part 64 accounting rules, and these standards are followed by Tier 1 carriers only. Requiring smaller LECs to comply with the safeguards may thus impose disproportionate burdens on them. If smaller carriers can demonstrate that safeguards are not needed to govern their operations, the Commission may limit safeguards to Tier 1 LECs.

C. The Safeguards Should Regulate Only "In-Region" CMRS.

The Notice (at ¶ 57) correctly observes that the competitive concerns underlying this proceeding are specific to geographic areas where an incumbent LEC offers CMRS. It thus grants an "interim waiver" of the provisions of Section 22.903 as they apply to out-of-region BOC provision of cellular service, and tentatively decides that safeguards should not apply to out-of-region CMRS.

The Commission is correct in determining that safeguards should apply only to "in-region" provision of CMRS. The anticompetitive risks theoretically exist only when the incumbent LEC is in the position to leverage its landline position to advantage its CMRS system. Where a LEC has no incumbent position in a geographic area, it by definition has no market power that it can leverage.

The Notice's use of the terms "in-region" and "out-of-region" reflect its focus on BOC-provided CMRS. These terms historically have applied only to the BOCs. They can, however, easily be defined to cover all incumbent LECs. The objective is to ensure that where LECs also offer own CMRS systems, the rules apply. Any safeguards which are adopted should apply to any incumbent LEC's provision of CMRS in a geographic area where it also provides landline telephone service.

D. The Safeguards Should Sunset Upon The Earlier of Compliance With the Checklist Or Three Years.

Both Congress and the Commission have recognized that radical changes are occurring in telecommunications markets generally and in the CMRS market